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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SANTOSH S. RAO, GOPAL SHARMA,
and POONAM P. DHAVAL

Appeal 2008-0258
Application 10/627,385
Technology Center 2100

Decided: September 17, 2008

Before JAMES D. THOMAS, LANCE LEONARD BARRY, and
STEPHEN C. SIU, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

DECISION ON APPEAL

A Patent Examiner rejected claims 1-31. The Appellants appeal
therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C.
§ 6(b).

A. INVENTION

The invention at issue on appeal "determine[s] which node or nodes of a cluster should be ejected from the cluster as a result of a cluster partition or other error event." (Spec. 5.)

B. ILLUSTRATIVE CLAIM

Claim 1, which further illustrates the invention, follows.

1. A method comprising:

providing a coordinator virtual device corresponding to at least a portion of a physical data storage device;

detecting when a computer system cluster, including a plurality of nodes, is partitioned;

attempting to gain control of the coordinator virtual device; and

removing at least one of the plurality of nodes from the computer system cluster when the attempting is unsuccessful.

C. REJECTION

Claims 1-31 stand rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,532,494 ("Frank").

II. CLAIM GROUPING

When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together

to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone.

Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.

37 C.F.R. § 41.37(c)(1)(vii) (2006).¹

Here, claims 1-31 are subject to the same ground of rejection. The Appellants argue claims 1-14 and 28-31 as a group (Replacement Br. 4-8, 10) and claims 15-27 as another group (*id.* 8-10). We select claims 1 and 15 as the sole claims on which to decide the appeal of the respective groups. "With this representation in mind, rather than reiterate the positions of the parties *in toto*, we focus on the issues therebetween." *Ex Parte Zettel*, No. 2007-1361, 2007 WL 3114962, at *2 (BPAI 2007).

III. COORDINATOR VIRTUAL DEVICE

The Examiner makes the following findings.

Referring to appellant specification and brief, appellant defined *coordinator virtual device* can be formed from one or more portions of physical storage devices such as one or more disk drives (specification, page 12, paragraph [0040]) and (brief page 2 lines 9-14). Frank teaches a shareable storage 22 as a single storage device and may include multiple storage devices (col. 3 lines 34-45, Fig. 1). The shareable storage taught by Frank is equated by the Examiner hereinafter as "*coordinator virtual device*".

¹ We cite to the version of the Code of Federal Regulations in effect at the time of the Appeal Brief. The current version includes the same rules.

(Ans. 9.) The Appellants argue that "Frank fails to teach or suggest that the shareable storage is a coordinator virtual device." (Replacement Br. 6.) Therefore, the issue is whether the Appellants have shown error in the Examiner's finding that Frank teaches a coordinator virtual device.

A. AUTHORITIES

"[A]nticipation is a question of fact." *In re Hyatt*, 211 F.3d 1367, 1371-72 (Fed. Cir. 2000) (citing *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 814-15 (1869); *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997)). Furthermore, "[a]rgument in the brief does not take the place of evidence in the record." *In re Schulze*, 346 F.2d 600, 602 (CCPA 1965) (citing *In re Cole*, 326 F.2d 769, 773 (CCPA 1964)).

B. ANALYSIS

Here, we observe that the Examiner's finding that Frank's shared storage device constitutes a coordinator virtual device is supported by the record. In contrast, the Appellants fail to explain why the shareable storage cannot be a coordinator virtual device. (Replacement Br. 6.) Therefore, they have shown no error in that finding.

IV. GAINING CONTROL

The Appellants argue that the "mere access to a shareable storage device is not the same as control of the shareable storage device." (Replacement Br. 6.) Therefore, the issue is whether Frank teaches gaining control of the coordinator virtual device.

A. FINDINGS OF FACT

Frank includes the following disclosure.

[D]ata residing on the shareable storage device 22 of FIG. 1 may also be shared by the multiple distributed applications [of nodes 12, 14, 16, and 18]. The DLM [i.e., distributed lock manager] 34 of node_1 12 locks out distributed applications of the other nodes 14, 16, 18 from data being accessed by the distributed application of node_1 12 within the shareable storage device 22. Accordingly, only a single application may be using a shared resource at a single time.

(Col. 4, ll. 60-67).

B. ANALYSIS

Because the DLM of the node accessing the shareable storage device locks out the other nodes in the cluster from using the shareable device, we find that a node's accessing of the storage device constitutes gaining control thereof.

V. VIRTUAL DEVICE CONFIGURATION SERVER

Citing "col. 1 lines 30-54" (Answer 12) of Frank, the Examiner finds that "each node in a network cluster is per se a server servicing one or more clients." (*Id.*) "The appellants . . . conclude that it is the Examiner's position that the node is *both* the claimed virtual coordinator device and the virtual device configuration server" (Replacement Br. 9) and argue that "[s]uch an argument is inconsistent with the claimed separate limitations . . . (*id.*)."
Therefore, the issue is whether the Appellants have shown error in the Examiner's finding that Frank teaches a virtual device configuration server.

A. FINDINGS OF FACT

Frank teaches that "[a] user can connect into the network cluster through any of the nodes in the network cluster." (Col. 1, ll. 46-47.)

B. ANALYSIS

Because the nodes provide access to the shared storage device coordinator virtual device, and users can connect to the network cluster via the nodes, we agree with the Examiner's finding that Frank's nodes constitute virtual device configuration servers. Because the Appellants' conclusion that "it is the Examiner's position that the node is *both* the claimed virtual coordinator device and the virtual device configuration server" (Replacement Br. 9) is incorrect, the argument based thereon shows no error in the Examiner's finding.

VI. ORDER

For the aforementioned reasons, we affirm the rejection of claims 1 and 15 and of claims 2-14, and 16-31, which fall therewith.

"Any arguments or authorities not included in the brief or a reply brief filed pursuant to [37 C.F.R.] § 41.41 will be refused consideration by the Board, unless good cause is shown." 37 C.F.R. § 41.37(c)(1)(vii). Accordingly, our affirmance is based only on the arguments made in the Replacement Appeal Brief. Any arguments or authorities omitted therefrom are neither before us nor at issue but are considered waived. *Cf. In re Watts*, 354 F.3d 1362, 1367 (Fed. Cir. 2004) ("[I]t is important that the applicant

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challenging a decision not be permitted to raise arguments on appeal that were not presented to the Board.")

No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

rwk

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